Filed 8/3/12 P. v. Williams CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LIONEL WILLIAMS, Defendant and Appellant.	D058809 (Super. Ct. No. SCD217394)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

A jury convicted Lionel Williams of four counts of robbery and two counts of attempted robbery. The jury also found true that Williams personally used a deadly and dangerous weapon in the commission of the four robberies and one of the attempted robberies. Williams appeals, contending: (1) the trial court erred when it failed to properly inquire into and evaluate the prosecutor's reasons for excusing two African-American females from the jury panel; (2) there was insufficient evidence to corroborate his accomplice's testimony; (3) the court erred

in denying his motion to sever the trial; and (4) the trial court's admission of field identification evidence violated his due process rights because the identification procedure was impermissibly suggestive and unreliable. We find Williams's arguments unavailing and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

2007 Incidents

In May 2007, Williams was staying with his friend, Rodrigo Gaerlan, Sr., when he met Ambrosio Penner. Penner had recently obtained a blue and white Ford Bronco with a license plate identification of "EMI★CAT." Williams asked Penner to drive him to commit robberies. Penner initially refused, but eventually agreed on June 2, 2007.

That same evening, Penner picked Williams up and the two men went to a gas station where Williams paid to put gas in the Bronco. Williams then directed Penner to drive to La Jolla. After arriving in La Jolla, Williams had Penner park and wait for his return. Williams was wearing glasses and dressed in dark clothing, including a beanie and "hoodie."

Around 10:45 p.m., Stanley Seidle was walking around his neighborhood in La Jolla when he heard a crackling sound in the bushes. An African-American man wearing a beanie and tortoise shell glasses then approached Seidle and grabbed him by his coat. The man asked Seidle, "Where's the wallet? Where's the wallet?" Seidle explained that he did not have a wallet and dropped his keys to demonstrate that he was not holding anything. The man then asked for the wallet again and

pushed a gun against Seidle's chest. As Seidle repeated that he did not have anything, the man patted him down. The man then picked up Seidle's keys, threw them into the canyon next to the street, and then walked away.

Around 11:00 p.m., Thomas and Quynh-Nga Bui Gredig were walking to their car after leaving a friend's party in La Jolla. An African-American man wearing heavy clothing and a hood or hat approached the couple, pointed a gun at Thomas and said, "Give me your wallet." After Thomas gave the man his wallet, the man moved toward Quynh-Nga. At that point, Quynh-Nga threw her purse into the street. The man then told the couple to run the other way. As the couple ran away, Quynh-Nga saw the man pick up her purse and the couple saw a white truck jump the median in the road.

After the man left, the Gredigs returned to the area and found a beanie on the curb. DNA was later recovered from that beanie and an analysis showed that Williams was a possible major contributor of the DNA and Penner was excluded as a contributor.

Penner testified that when Williams returned to his vehicle, Williams was missing his beanie and breathing hard. Penner was going the wrong way, so he made a U-turn over the center median and headed to the freeway. Williams mentioned something about throwing someone's keys and had a purse, wallet and cell phone with him. While they were driving, Williams looked through the items and then tossed them out of the window. A jogger later found some of Quynh-Nga's property and the Gredigs recovered it from an exit off of the freeway.

When Penner and Williams were on the freeway, Williams stated that he did not get enough and convinced Penner to go to another location. Williams instructed Penner to follow a car into a residential area. As the car they were following slowed down, Penner passed it and parked in a location where they would not be seen. Williams got out of the vehicle and disappeared from Penner's sight.

Between midnight and 1:00 a.m. on June 3, 2007, Lydell Heard and his girlfriend, Jessica Vasquez, were driving home from a Jack in the Box restaurant when they noticed a Ford Bronco with a license plate that had a star in the middle and ended with "CAT." The Bronco was initially in front of Heard and Vasquez, but then got behind them. When Vasquez parked across from her house, the Bronco slowed down and then continued down the street.

As Vasquez and Heard gathered things from their car, an African-American man with a gun approached them and demanded their wallets. The man was wearing glasses and a dark jacket with a hood over his head. Vasquez gave the man her purse and Heard gave him his wallet. After Vasquez and Heard got out of their car, the man instructed them to walk down the hill. The couple went down to a neighbor's house and hid behind some hedges. At that point, they saw the same Bronco that they had seen earlier come down the hill.

Penner testified that when Williams returned to his car, Williams had a purse and a bag of fast food with him. Penner drove away from the scene and headed to pick up his cousin, Rodrigo Gaerlan, Jr. (R.J.), from a party. Penner picked R.J. up and dropped both R.J. and Williams off at Gaerlan, Sr.'s home.

Penner was arrested on June 4, 2007, while driving the Bronco. He later admitted that he and Williams were involved in the robberies. Penner pleaded guilty to four counts of robbery and entered into a cooperation agreement with the prosecution.

Officers searched Williams's residence on June 12, 2007. They found multiple pairs of gloves, dark colored "hoodies," dark jeans, and multiple beanies. They also found tortoise shell prescription glasses. In Penner's Bronco, officers found a cell phone containing Williams's phone number and reflecting a call to that number on June 2, 2007.

2008 Incident

On a night in November 2008, Julie Leyden was returning to her home in Rancho Peñasquitos when she heard a noise behind her as she stood at her front door. When she turned around, Leyden saw a man crouched down wearing a dark hooded sweatshirt with stitching around it. The man grabbed at Leyden's handbag, which got tangled in her shawl. When the man could not get the handbag free, he pulled Leyden to the ground and dragged her down the sidewalk. Leyden's purse opened and its contents spilled out. Leyden screamed and the man took off running. Leyden called 911.

Officer Dave Dunhoff responded to the call and headed north of Leyden's home. He saw a vehicle speeding away from the area and conducted a traffic stop. Williams was driving the vehicle, sweating profusely, and wearing clothing similar to the reported robbery suspect. Williams was nervous and told Officer Dunhoff

that he had been sleeping in his car. Williams later changed his story and said he pulled over because he was feeling sick. Officer Dunhoff searched Williams's vehicle and found flashlights, screwdrivers and a knit cap and gloves under the driver's seat.

Officer Jose Oliveras transported Leyden to the location where other officers had detained Williams in order to conduct a curbside identification. Officer Dunhoff presented Williams with the hood of Williams's sweatshirt up and down. Leyden responded by stating, "That's him. Oh, yeah. I remember the white trimming on the sweat[shirt]. I'm sure that's him."

DISCUSSION

I. *Alleged Wheeler/Batson Error*

A. Background

During the voir dire proceedings, Prospective Juror No. 5 stated that she recently retired after 30 years as a medical surgical nurse with Veterans Affairs. She also stated that she had two children, one was a computer analyst and the other was a pharmacy assistant.

Prospective Juror No. 6 stated that she worked for a private security company and had daily contact with inmates. She also disclosed that her sister-in-law was robbed while working at a dry cleaner and later that same day, her sister-in-law was involved in a second incident when a man robbed the restaurant where she was eating. No. 6 stated that she did not follow up regarding whether the robber was arrested in either instance.

The prosecutor used two of his peremptory challenges to excuse Prospective Juror Nos. 5 and 6. Williams made a "*Batson* motion," claiming prosecutorial discrimination against African-American potential jurors. The court determined that Williams made a prima facie showing of discrimination because Prospective Juror Nos. 5 and 6 were both African-American females.

The prosecutor explained that he excused No. 5 because she was a nurse and he was "not a fan of people in biotech or the nursing professions." He later elaborated, stating that "nurses, scientists, [and] doctors . . . are all people that require, in [his] experience, more proof than proof beyond a reasonable doubt in terms of lay people." The prosecutor also stated that he preferred another juror over No. 5 because the other juror, as opposed to No. 5, was the victim of a robbery.

In regard to Prospective Juror No. 6, the prosecutor stated that there were several things that concerned him. Specifically, the prosecutor explained that he excused No. 6 because: (1) it bothered him that she did not follow up regarding her sister-in-law's robbery and was dismissive of it; (2) he did not like her demeanor and attitude, including that she was opinionated and interrupted the court; and (3) she worked with inmates every day.

After hearing from both parties, the trial court denied Williams's motion, concluding that there were "sufficient and numerous race-neutral reasons" for the peremptory challenges. The trial court also noted that the prosecutor consistently passed on two African-American male prospective jurors.

B. Analysis

Williams argues the trial court committed reversible error when it failed to properly inquire into and evaluate his claim of *Batson/Wheeler* error because the prosecutor's reasons for excusing two potential jurors who were African-American females were not sufficient to rebut his prima facie showing of discrimination and the court failed to make a sincere inquiry before accepting those reasons for excusing the jurors. We disagree.

In *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), our Supreme Court "'held that the use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution. Subsequently, in *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 [(*Batson*)] . . . the United States Supreme Court held that such a practice violates, inter alia, the defendant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. African-Americans are a cognizable group for purposes of both *Wheeler* [citation] and *Batson* [citation].' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 116-117; see also *People v. Motton* (1985) 39 Cal.3d 596, 605 ["'[B]lack women constitute a "cognizable group."'"].)

We presume that "a prosecutor uses his peremptory challenges in a constitutional manner." (*People v. Alvarez* (1996) 14 Cal.4th 155, 193 (*Alvarez*).) The defendant bears the burden of showing "prima facie, the presence of purposeful

discrimination. [Citation.]" (*Ibid*.) To establish a prima facie case of group or racial bias, a defendant must show a "'strong likelihood'" of group rather than individual bias. (*People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154, italics omitted.) "Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenges at issue." (*People v. Jenkins* (2000) 22 Cal.4th 900, 993.)

A prosecutor's explanation for exercising a peremptory challenge "need not rise to the level justifying exercise of a challenge for cause." (*Batson, supra*, 476 U.S. at p. 97.) Such will be sufficient if it is genuine and neutral, even if trivial. (*People v. Arias* (1996) 13 Cal.4th 92, 136 (*Arias*).) A "'hunch'" about a prospective juror or an arbitrary excusal may be a sufficient justification if it shows the prosecutor exercised a peremptory challenge for reasons other than impermissible group bias. (*People v. Williams* (1997) 16 Cal.4th 635, 664.) A prosecutor's perception of a prospective juror's "'"body language or manner of answering questions"'" may constitute a sufficient nondiscriminatory reason. (*Arias*, *supra*, at p. 136.) Additionally, occupation can be a permissible, nondiscriminatory reason for exercising a peremptory challenge. (See *People v. Trevino* (1997) 55 Cal.App.4th 396, 411; *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315; *People v. Barber* (1988) 200 Cal.App.3d 378, 394.) If the prosecutor provides race-neutral reasons, the trial court must then decide whether those reasons are untrue and pretextual.

(*People v. Ayala* (2000) 24 Cal.4th 243, 261; *Alvarez, supra*, 14 Cal.4th at pp. 196-197.)

In reviewing a trial court's determination whether a prosecutor's neutral explanations for exercising peremptory challenges are genuine and not a pretext for racial or other group discrimination, we apply the substantial evidence standard of review. (*People v. Williams*, *supra*, 16 Cal.4th at p. 666; *Alvarez*, *supra*, 14 Cal.4th at pp. 196-198.) In doing so, we give "great deference to the trial court's ability to distinguish bona fide reasons for the exercise from sham excuses." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1284-1285.) If the trial court "makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to [such] deference on appeal. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) "'In such circumstances, [we] will not reassess good faith by conducting [our] own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount "'the variety of [subjective] factors and considerations,'" including "prospective jurors' body language or manner of answering questions," which legitimately inform a trial lawyer's decision to exercise peremptory challenges.' [Citation.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1197.) Moreover, the absence of express findings by the trial court does not show it did not satisfy its obligation to make a "'sincere and reasoned'" effort to evaluate the nondiscriminatory reasons offered. (*Id.* at pp. 1197-1198.) "*Wheeler* does not require the trial court to conduct further inquiry into the prosecutor's race-neutral

explanations if . . . it is satisfied from its observations that any or all of them are proper. [Citation.]" (*Id* at p. 1198.)

Here, there is substantial evidence to support the trial court's finding that the prosecutor excused Prospective Juror Nos. 5 and 6 for race-neutral reasons. In regard to No. 5, the prosecutor expressed concern that she was a nurse because, in his experience, people in that profession require "more proof than proof beyond a reasonable doubt in terms of lay people." Courts have found similar reasons to be race-neutral. (See, e.g., *People v. Barber*, *supra*, 200 Cal.App.3d at p. 394 [a juror was challenged because of profession based on the prosecutor's belief that kindergarten teachers are often liberal and not prosecution oriented]; *People v. Granillo* (1987) 197 Cal.App.3d 110, 120, fn. 2 ["[m]any prosecutors believe various professional people are unacceptable because they may be too demanding or they look for certainty"].) In addition to Prospective Juror No. 5's profession, the prosecutor in this case also stated that he preferred another juror because that juror, as opposed to No. 5, was the victim of a robbery. The changing composition of a jury is a legitimate reason to exercise a peremptory challenge. (*People v. Reynoso* (2003) 31 Cal.4th 903, 918-919.)

With respect to Prospective Juror No. 6, the prosecutor offered multiple reasons for challenging her, including her dismissive attitude toward a robbery incident involving her sister-in law, her demeanor and manner of answering questions, and that she worked with inmates on a daily basis. A prosecutor's perception of a prospective juror's "body language or manner of answering

questions" may constitute a sufficient nondiscriminatory reason for a peremptory challenge. (*Arias*, *supra*, 13 Cal.4th at p. 136.) The record supports the prosecutor's claim that No. 6 interrupted the court while being questioned and that she was somewhat dismissive of her sister-in-law's robbery. At one point, No. 6 even stated that she thought that if she spoke fast, the court would not think to stop her. Further, the prosecutor could legitimately be concerned about No. 6's daily contact with inmates because that could be viewed as a factor potentially favoring the defense.

The prosecutor's stated reasons for excusing Prospective Juror Nos. 5 and 6 were plausible and supported by the record. That being so, the trial court was not required to further inquire into the prosecutor's reasons. By personally observing the prosecutor's demeanor in providing his explanations, the trial court presumably weighed the prosecutor's veracity and determined whether his explanations, which were supported by the record, were legitimate, race-neutral reasons for excusing those jurors. The trial court was not required to "cross-examine" the prosecutor to determine the veracity of his explanations. Further questioning of a reason is only required where the explanation is implausible or suggests bias. (*People v. Silva* (2001) 25 Cal.4th 345, 386; *People v. Hall* (1983) 35 Cal.3d 161, 168-169.) Here, the prosecutor's reasons for exercising his peremptory challenges to Prospective Juror Nos. 5 and 6 were reasonable and did not suggest bias. Thus, we conclude the trial court properly denied Williams's *Batson/Wheeler* motion.

II. *Sufficiency of the Corroborating Evidence*

Williams argues there was insufficient evidence to corroborate Penner's testimony as required by Penal Code section 1111. We disagree.

A conviction cannot be based solely on accomplice testimony without sufficient corroboration that "tend[s] to connect the defendant with the commission of the offense." (Pen. Code, § 1111.) Evidence that sufficiently corroborates an accomplice's testimony "'"must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime[,] but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged . . . ."'" (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) The evidence necessary to corroborate accomplice testimony need only be slight, such that it would be entitled to little consideration standing alone. (*People v. Sanders* (1995) 11 Cal.4th 475, 534-535.) It is enough that the corroborative evidence tends to connect defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth. (*Id*. at p. 535.) Corroborative evidence may be entirely circumstantial. (*People v. Hayes, supra,* 21 Cal.4th at p. 1271.)

When reviewing the issue of corroboration of accomplice testimony, a court must eliminate the accomplice's testimony from its consideration, and examine the remaining evidence to determine whether there is evidence connecting the defendant to the crime. (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.) "If the sum total of all of the evidence (other than the accomplice's testimony),

connects the defendant to the commission of the offense the requirements of Penal Code section 1111 are satisfied." (*People v. Manson* (1977) 71 Cal.App.3d 1, 36.)

We apply a highly deferential standard in reviewing the jury's finding of corroborating evidence. "'"[U]nless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably *tend* to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal." [Citation.]' [Citation.]" (*People v. Garcia* (2001) 89 Cal.App.4th 1321, 1329-1330; accord *People v. McDermott* (2002) 28 Cal.4th 946, 986.)

Applying these standards to the case before us, we conclude the jury had a reasonable basis to find the corroborating evidence connected Williams to the robberies. Apart from Penner's testimony, the testimony of the victims and evidence found at the scenes of the robberies and Williams's residence connected Williams to the crimes. Seidle testified that the perpetrator was an African-American man wearing tortoise shell glasses and a beanie. Officers found similar items at Williams's residence. The Gredigs found a beanie when they returned to the area where they were robbed. That beanie had Williams's DNA on it. Additionally, Thomas Gredig, Heard and Vasquez all testified that although they were not positive that Williams was the perpetrator, Williams resembled him.

Multiple witnesses also connected Williams to the Bronco that was seen near the scenes of multiple crimes. After they were robbed, the Gredigs saw a white truck jump the median in the road. Heard and Vasquez also saw a Bronco with a

license plate ending in "CAT" just before and after they were robbed. R.J. confirmed that Williams was in the Bronco with Penner on the night of the 2007 robberies.

Based on this evidence, Penner's testimony was sufficiently corroborated. The evidence was more than the necessary "slight" corroboration to permit the jury to consider the accomplice's testimony. (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 534-535.) The evidence linked Williams to each of the offenses. "It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight." (*People v. Rice* (1938) 29 Cal.App.2d 614, 619; accord, *People v. Miller* (2000) 81 Cal.App.4th 1427, 1442.)

Williams's reliance on *People v. Robinson* (1964) 61 Cal.2d 373 (*Robinson*) and *People v. Martinez* (1982) 132 Cal.App.3d 119 (*Martinez*) is unpersuasive. In *Robinson*, the defendant's fingerprints were found in a car owned by his acquaintance and both were charged with first degree murder. (*Robinson*, *supra*, at p. 397.) It was undisputed that the defendant had numerous opportunities to place his fingerprints on the vehicle under circumstances that were unconnected to the crime. (*Id*. at p. 399.) The prosecutor nonetheless argued that the presence of the defendant's fingerprints in the car corroborated an accomplice's testimony that the defendant participated in that particular crime. (*Id*. at p. 398.)

The California Supreme Court rejected this argument, reasoning that the fingerprints "merely placed [the defendant] in the car at some time prior to the time

the car was discovered" and thus were insufficient to connect the defendant to the crime. (*Robinson, supra,* 61 Cal.2d at p. 400.) The court emphasized that to "hold that the presence of those prints connects [the defendant] with the commission of the crime is tantamount to saying that the fingerprints of any relative of a person known to have committed a crime, found on the automobile of such person, tend to connect the relative with the crime, even though it is known that the relative has had the opportunity to be in and out of that car on various occasions other than during the commission of the crime. Such a theory is unsound. Certainly association with a criminal is not to be equated with connection with the crime." (*Id*. at p. 399.)

In *Martinez*, the court found that there was insufficient corroborating evidence when the testimony of an accomplice identifying the defendant as the robber was supported only by one other witness who stated that defendant's complexion was "exactly like" that of the robber. (*Martinez*, *supra*, 132 Cal.App.3d at p. 133.) That witness, however, also contradicted the accomplice by testifying that the robber had a beard. (*Ibid*.) Notably, in *Martinez*, the Attorney General conceded that there was no evidence other than the accomplice testimony connecting the defendant with the commission of the charged robberies. (*Id*. at p. 132.)

Here, unlike *Robinson*, the corroboration evidence was not merely Williams's association with the accomplice and, unlike *Martinez*, more than one witness connected Williams to the offenses. In addition to Williams being in the Bronco on the night of the crimes, at least three witnesses stated that a male of

Williams's general description was at the crime scenes and Williams's DNA was found on a beanie near one of the robberies. There was far more evidence in this case connecting Williams to the offenses than the evidence linking the defendants in *Martinez* and *Robinson* to their charged crimes. Thus, Williams's reliance on those cases is misplaced, and we conclude there was sufficient corroborating evidence to connect Williams to the crimes.

III. *Motion to Sever the Charges*

A. Background

Prior to trial, Williams moved to sever (1) the charges stemming from the 2007 robberies from the 2008 robbery, and (2) the charges stemming from the robberies of the Gredigs from the remaining 2007 incidents. Williams argued the 2007 charges should be severed from the 2008 charges because of the potential spillover effect of evidence from strong charges to weak ones and to minimize the impact of evidence which might inflame the passions of jurors. He also asserted that judicial economy did not support joining the charges and due process and fair trial considerations warranted the severance. With respect to the robberies involving the Gredigs, Williams argued they should be severed because jurors would be unable to compartmentalize the DNA evidence found on the beanie recovered near the scene of the Gredigs' robberies from the other charges.

The trial court denied the motion on grounds that all of the charges were of the "same class," the charges stemming from the 2007 incidents were connected together in their commission in that they all occurred in one evening, the 2008

incident involved the same mode and method as the 2007 incidents, evidence was cross-admissible, and joinder was in the interest of judicial economy.

B. Analysis

Williams repeats the arguments he made below on appeal. Specifically, he contends it was unlikely that jurors could compartmentalize Leyden's out-of-court identification of Williams and the DNA evidence found on the beanie from the charges not involving that evidence. We disagree with his contentions.

Penal Code section 954 permits the joinder of "two or more different offenses of the same class of crimes or offenses." Williams concedes that the offenses he was charged with are of the same class. Thus, the offenses meet the statutory requirement for joinder under Penal Code section 954.

A trial court has discretion to order that properly joined charges be tried separately (Pen. Code, § 954), but there must be a "clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.) In assessing a claimed abuse of discretion, we assess the trial court's ruling by considering the record then before the court. (*People v. Soper* (2009) 45 Cal.4th 759, 774; *People v. Avila* (2006) 38 Cal.4th 491, 575.)

Here, even assuming the evidence was not cross-admissible, Williams has not shown prejudice or an abuse of discretion. We do not see this as a case where some of the charges were weaker than others. To the contrary, there was significant evidence as to each crime (*see ante*, part II) and there is no reason why jurors could

not assess the legitimacy and significance of Leyden's identification and the DNA evidence without having that evidence impact their assessment of the other charges. There is nothing in the record that suggests the jury was confused or improperly considered the evidence. Further, all of the charges involved similar facts and a similar pattern of conduct. Thus, it cannot be said that one event was more inflammatory than the other. Accordingly, the trial court acted well within its discretion in denying Williams's severance motion.

IV. *Admission of Field Identification Evidence*

Williams argues the trial court's admission of evidence of Leyden's field identification of him violated his due process rights. Specifically, he contends the field identification procedures were unduly suggestive and unreliable because Leyden did not identify him until the officers put a hood over his head and had him assume a crouching position, only 45 minutes had elapsed since the robbery, and an officer told Leyden that they had detained a suspect in the area.

A pretrial identification procedure violates due process only if it is so impermissibly suggestive that it creates a "very substantial likelihood of irreparable misidentification." (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819 (*Contreras*.) In determining whether the admission of identification evidence violated Williams's due process rights, we must consider (1) whether the identification procedure was unnecessary and unduly suggestive, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) Only if

the answer to the first question is yes and the answer to the second question is no is the identification constitutionally unreliable. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

Williams bears the initial burden of showing that the pretrial identification procedure was unduly suggestive and unnecessary, such that its introduction resulted in unfairness that infringed his due process rights. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 305.) He must show unfairness as a "'demonstrable reality,'" rather than mere speculation. (*Contreras, supra,* 17 Cal.App.4th at p. 819.)

Here, there was conflicting evidence regarding the field identification procedures. Leyden testified that she identified Williams after she asked an officer to put Williams's hood partially over his face and have him assume a crouching position. However, Officer Dunhoff, who presented Williams at the curbside identification, testified that he presented Williams with his hood up and down, but Williams never got into a crouching position. The trial court ruled that the field identification procedures were not unduly suggestive and unnecessary. In making its ruling, the court noted the conflicting testimony, but concluded that "the more reliable testimony" came from the officers as opposed to Leyden regarding the procedure used.

Williams has not identified any procedures that rendered the field identification unduly suggestive or unreliable. As the trial court noted, the showup identification procedure utilized in this case was "a procedure that is common with virtually every curbside lineup that occurs." Any suggestiveness that came from the

proximity in time of the lineup to the crime was "offset by the reliability of an identification made while the events [were] fresh in the witness's mind." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387.) Further, although officers may have told Leyden that they had stopped someone that they wanted her to look at, Leyden testified that officers never told her that Williams was the assailant. Telling a witness that a suspect is in custody is not impermissible in the context of identification procedures. (*Contreras*, *supra*, 17 Cal.App.4th at p. 820.) Similarly, in regard to Williams's hood being put over his head, it is not improper for an officer preparing for a lineup to require a suspect to put back on the clothes the suspect was wearing at the time of arrest and doing so does not render the identification procedure unduly suggestive. (*People v. Floyd* (1970) 1 Cal.3d 694, 713, disapproved on other grounds in *Wheeler*, *supra*, 22 Cal.3d at p. 287, fn. 36.) Lastly, we are not persuaded that Williams assumed a crouching position during the identification. As we noted, there was conflicting evidence in this regard and the trial court found the officers' testimony was more credible than Leyden. We will not disturb the trial court's credibility finding on appeal. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

In sum, we conclude Williams failed to satisfy his burden of demonstrating that the field identification procedures were unduly suggestive or unreliable. Consequently, the trial court did not err in admitting evidence of the identification.

DISPOSITION

The judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

MCDONALD, J.